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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 402

WILLIAM HENRY LEDFORD, WILLIAM RAMSEY BROCK, W. B. LINT, AND WILLIAM SAMPSON METCALF, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 208–212) is reported at 155 F. 2d 574.

JURISDICTION

The judgment of the circuit court of appeals was entered May 31, 1946 (R. 207), and a petition for rehearing (R. 213) was denied July 15, 1946 (R. 214). The petition for a writ of certiorari was filed August 14, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of

February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether, in a criminal prosecution for conspiracy to stuff ballot boxes, it is incumbent on the Government to establish, as a condition of admissibility of the fraudulently voted ballots, that they are in the same condition as when deposited in the ballot boxes and that there has been no opportunity to tamper with them in the interim.

2. Whether there was evidence that the ballots alleged to have been fraudulently voted were actually tampered with prior to trial.

3. Whether the participation of petitioners as election officials was sufficiently proved.

STATUTE INVOLVED

Section 19 of the Criminal Code (18 U. S. C. 51) provides in pertinent part:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, * * * they shall be fined not more than $5,000 and imprisoned not more than ten years * * *.

STATEMENT

An indictment filed June 5, 1943, in the District Court for the Eastern District of Kentucky

charged, in substance, that petitioners, who were duly appointed election officers for Mary Helen Precinct 39–A, Harlan County, Kentucky, conspired, in violation of Section 19 of the Criminal Code, *supra,* to injure and oppress voters of that precinct in the free exercise of their right to vote for the Republican candidate for United States Senator in an election held November 3, 1942, and to have their votes counted and recorded accurately and without diminution or dilution, by falsely marking and voting a large number of blank and unvoted ballots for the Democratic candidate and placing them in the ballot box with the legal ballots (R. 2–9).[1] Petitioners were found guilty after a jury trial (R. 23), and each was sentenced to imprisonment for a year and a day and to pay a fine of $100 (R. 25–29). On appeal, their convictions were affirmed (R. 207).

The Government's evidence may be summarized as follows:

Petitioners were the duly appointed election officers for Mary Helen Precinct 39–A, Harlan County, Kentucky, in the election on November 3, 1942, of a United States Senator, Ledford being named clerk of the election, Brock, the sheriff, and Lint and Metcalf, judges (R. 40–42). Mrs. Ruby Middleton, clerk of Harlan County Court, delivered to Ledford the various election paraphernalia, such as ballots, ballot boxes, sample bal-

[1] The indictment is substantially similar to that involved in *United States* v. *Saylor*, 322 U. S. 385.

lots, copies of the names and addresses of registered voters, etc., and received a receipt therefor from him (R. 44). The ballot boxes were locked with three locks to a box, the keys for which were retained by the county commissioners (R. 46–47). Following the election, the boxes containing the voted ballots and a sack containing the unused ballots, stub book, and other materials were returned to Mrs. Middleton by Ledford and Brock (R. 45–47). For their services as election officials, county warrants in the amount of $3.00 were issued to Metcalf and Lint, and in the amount of $3.96 to Ledford and Brock. Metcalf's and Lint's warrants were endorsed by them personally. Ledford's and Brock's were endorsed, respectively, "Henry Ledford by E. Kelly" and "Ramsey Brock by E. Kelly." (R. 74–78.) The ballots voted in Mary Helen Precinct 39–A all bore the purported signatures of Ledford and Lint (R. 79).

After the ballot boxes had come in from the different precincts, they were delivered by Mrs. Middleton to the county commissioners, who unlocked the boxes, counted the ballots, and then returned the boxes to the county clerk's office, where they were stacked for several weeks. Most of the boxes were securely locked at this time, but the clerk could not swear that all were. Later the boxes were removed, still locked, to a "boxed up" storage space under a stairway leading from the courthouse lobby to the basement. The key to the

door at the head of this stairway was kept by the janitor. (R. 47–50.) About May 4, 1943, pursuant to an order of the trial court (R. 1), all the ballots, boxes, stub books, and other records for the various precincts were delivered by Mrs. Middleton to a deputy United States marshal, who issued a receipt therefor and turned them over to the deputy clerk of the trial court (R. 52–55, 66–67).

F. B. I. Agent Miller, an expert witness on document examination (R. 178–179), testified that his examination of the Mary Helen Precinct ballots disclosed that each of 110 of them bore, in addition to the pencilled markings, an indentation or impression in the form of a cross or circle, indicating to him that it lay directly beneath another ballot at the time the latter was thus marked.[2] Some of these impressions were visible to the naked eye, while others could be detected only by the use of a special apparatus. Seven of these ballots, photographically enlarged, which Miller testified bore such impressions after the names of Democratic candidates, were introduced in evidence, and he also testified that eleven additional ballots were similarly marked. (R. 180–188.)

The Government also proved that more than 40

[2] The logical inference to be drawn from Miller's testimony is that 110 ballots lying over the ballots bearing the impressions were marked for voting while they were still attached to the stub book.

persons, who were listed as registered voters in Mary Helen Precinct 39–A and whose names appeared on ballot stubs as having voted there on November 3, 1942, in fact did not vote and that all of these persons were well known to petitioners or some of them[3] (R. 82–86, 94–97, 99–114, 123–153, 154–167, 172–177, 200–203). Many of these persons had moved to other states (R. 84, 103, 106, 107–108, 111, 133, 136–137, 146–147, 175–176, 200–201) or elsewhere in Kentucky (R. 100, 104, 110, 172). Several were absent serving in the armed forces (R. 94, 108–109, 145–146, 159, 163–164) and one was missing in action (R. 142, 202). Five had never voted in their lives (R. 124, 126, 130, 132, 162–163), one was sick in a hospital (R. 102), and two were dead (R. 113, 151).

Petitioners did not take the stand and offered no evidence.

ARGUMENT

1. The principal contention urged in the petition for a writ of certiorari and the reasoning on which it is based may be stated as follows: Under Kentucky law, before ballots may be considered as properly admissible in evidence, their integrity must be proved by clear and satisfactory evidence—that is, the burden rests on the party introducing the ballots to prove that they are in

[3] The obvious purpose of this latter evidence was to show that there was no possibility that other persons falsely identified themselves to the election officials as the persons thus listed as voting.

the same condition as when they were voted at the polls, and that there has been no opportunity to tamper with them; there being no federal law specifically governing the subject, federal courts in Kentucky are bound by this state rule of evidence; the Government in this case failed thus to establish the integrity of the ballots alleged to have been falsely marked and voted by petitioners; therefore, the ballots were incompetent evidence and it was error to admit them (Pet. 5–9).

A federal court, however, is not required in criminal cases to follow the rules of evidence prevailing in the particular state in which it is located. *United States* v. *Reid,* 12 How. 361; *Logan* v. *United States,* 144 U. S. 263, 298–303. Indeed, the strict rule formerly prevailing that the rules of evidence to be applied in criminal prosecutions in a federal court, in the absence of a specific federal statute governing the subject, are the rules which were in effect in the state in which the court is located at the time of the state's admission into the Union, has been superseded by the more liberal rule providing that a federal court should apply the common law rules of evidence, with such changes as modern conditions and experience indicate are necessary. *Funk* v. *United States,* 290 U. S. 371. Such a rule, this Court has said, is the only one flexible enough to lead to "the successful development of the truth," the "fundamental basis upon which all rules of evidence must rest." Id., 381.

But in any event, as pointed out by the circuit court of appeals (R. 210), the Kentucky rule requiring that the party seeking to introduce the ballots first establish their integrity and lack of opportunity to tamper with them does not avail petitioners, for that rule was declared and has been applied only in election contests. See *Lewis* v. *Hensley,* 238 Ky. 58, 62; *Rich* v. *Young,* 176 Ky. 813, 817; *Thompson* v. *Stone,* 164 Ky. 18, 23. In such cases, involving the question of which of two rival candidates in a close contest in fact received the greater number of legally cast votes, the necessity of establishing, as a condition of admissibility of the ballots in evidence, that they are in exactly the same condition as they were when cast, and particularly that there has been no opportunity to tip the delicately balanced scales in favor of the contesting candidate by improper meddling with the ballots, is obvious. In a criminal prosecution for fraudulently stuffing ballot boxes, however, there is no reason for such a rule, and consequently no such rule is applicable. Thus, in *State* v. *Carr,* 151 Kans. 36, involving a prosecution for ballot box stuffing, the court said (p. 44):

> Defendant contends the trial court erred in permitting the ballots to be introduced in evidence for ten asserted reasons, none of which is supported by extended argument or citation of authorities, further than to show the ballots would not be admissible in evidence in an election contest because at

> the time they were taken by the county attorney they were not in the same condition as when received by the county clerk immediately after the election * * *. It must be remembered that in an election contest it is highly important that it be shown the ballots were properly preserved after being counted, and were so kept by the county clerk that no person was afforded any opportunity to tamper with them, so that in event of a recount as the result of an election contest, a wrong result might be reached. The case before us involves no rights of candidates at the election as to who received the greater number of votes.

Similarly, in *People* v. *Newsome,* 291 Ill. 11, involving a prosecution for fraudulently altering ballots, the court said (p. 17):

> It is also urged that the ballots were not properly preserved and that none of them were identified by witnesses. Whatever may be the rule as to the competency of ballots in cases of election contests, such rule does not apply to the competency of ballots in a criminal prosecution of this character. They were admissible in evidence, together with the evidence of the manner in which they had been preserved, for what they were worth, and it was for the jury to determine what weight should be given to them as evidence under all the circumstances of the case.[4]

[4] To the same effect, see *People* v. *Harrison*, 384 Ill. 201, 206-207.

The circuit court of appeals properly, we submit, adopted this view (R. 210–211). The ballots obviously were relevant evidence, and, as that court pointed out (R. 211–212), the weight to be given to them as such and to the evidence concerning their condition at the time of trial was for the jury to determine in the light of all the evidence as to the custody and handling of the ballots and boxes after the election.

2. Petitioners insist, however, that the record "positively" shows that they "were convicted solely upon the introduction of ballots and other election paraphernalia which had been tampered with between the time of the election and their introduction at the trial in court" (Pet. 7). In support of this contention, they quote (Pet. 12–13), out of context, a series of questions asked and answers given in the course of their counsel's cross-examination of Mrs. Middleton, the clerk of Harlan County Court, who had custody of the ballot boxes and other election paraphernalia from the time they were brought to her office on election night until she turned them over to the deputy United States marshal on or about May 4, 1943 (see pp. 4–5, *supra*). A reading of all of Mrs. Middleton's testimony on this subject refutes petitioners' contention. This election material had been kept in her office for several weeks and then removed to a storage space in the basement (*supra*, p. 4). Mrs. Middleton admitted that her office was open to the public and that people having

business there were in and out of the office throughout the day (R. 60). She also stated, however, that the people thus entering her office "don't get near this other material [i. e., the election material]" (R. 60), but this testimony petitioners neglect to include in the quoted colloquy. Apparently, however, petitioners mainly rely on the statement made by Mrs. Middleton in reply to the question whether, from her observation of the ballot boxes at the time she delivered them to the deputy marshal, they were in a different condition than they were when they were moved from her office to the basement. The answer given (R. 62) was:

> Well, I don't know where it happened, but some of them were different. I don't know when it happened but some of them were different.

The subsequent re-direct examination of Mrs. Middleton, however, revealed that she was not referring to the ballot boxes themselves when she stated that "some of them were different." She testified that the boxes appeared at that time to be in the same condition as when she received them (R. 63), and that she "wasn't referring to any of the material that was in the boxes when I said that some of the material was gone" (R. 64). And in answer to a question by the court whether there was "any change other than what is shown there on that paper itself [i. e., the receipt given by the deputy marshal when he received the elec-

tion materials (see R. 53–55)]? Does the paper show it all?," she replied, "All that I recognized as being missing; in other words, when the material came back from the commissioners I am quite sure that some of that material was missing that was checked out by me on the night of the election" (R. 64). On re-cross examination, she denied that "there was some material missing in those boxes that were in there when you turned it over to the commissioner[s]" for tabulation; and when she was asked what she had said was missing, she replied that she "wasn't in the tabulating room and didn't see the stuff put in the boxes and I checked the stuff out to the folks that were impounding the material. I checked it out rigidly to them; but on this other that you asked about that was missing, it didn't come from the boxes" (R. 65). Thus, Mrs. Middleton's entire testimony relevant to the point now raised by petitioners (R. 52–66) shows conclusively that when she said some of the election materials were "different" or "missing" at the time she delivered them to the deputy marshal, she was not referring to the ballot boxes or their contents, the only materials relevant to petitioners' contention. On the contrary, examination of the deputy marshal's receipt, which she said noted all the missing items, plainly shows that all she meant was that, for certain precincts, the stub book, or the secondary stubs, or the sack itself in which the stub book and secondary stubs were supposed to be

contained was missing and had been missing since she received the materials back from the commissioners after they had counted the ballots.

3. Although petitioners do not deny they were duly appointed as the election officials for Mary Helen Precinct 39–A, they contend that there was no proof that they actually served as such officials at the election in question (Pet. 10–12). They say that "It could have been very easy, if these petitioners were guilty, for the Government to have introduced legal voters who appeared at the polls and proven by them, if possible, that the petitioners actually served at the election in question" (Pet. 10). It is true that this fact might have been established by testimony of the character suggested by petitioners, but we submit that the evidence adduced on the issue (*supra,* pp. 3–4) was entirely sufficient without such testimony. Petitioners point only to the evidence that Ledford's and Brock's county warrants in payment for their services as election officials (R. 74–78) were endorsed in their names by one "E. Kelly" (R. 74, 75) and they contend that such evidence does not support an inference that they in fact acted as such officials. This argument, of course, does not avail Metcalf and Lint, but even as to Ledford and Brock, the fact that the warrants were issued to them and were endorsed in their names, even without the other evidence as to their activities in the conduct of the election (*supra,* pp. 3–4), is amply sufficient to support

the inference that they actually fulfilled the duties to which they had been appointed.

CONCLUSION

The decision below is correct and no conflict of decisions or important question is involved. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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